U.S. Department of Labor

Benefits Review Board
200 Constitution Ave. NW
Washington, DC 20210-0001

BRB No. 20-0508 BLA

MICHAEL W. HENDRIX	)	
	)	
Claimant-Respondent	)	
	)	
v.	)	
	)	
BLUE CREEK MINING, LLC	)	DATE ISSUED: 09/16/2021
	)	
and	)	
	)	
ROCKWOOD CASUALTY INSURANCE COMPANY	)	
	)	
Employer/Carrier-Petitioners	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order Awarding Benefits of Theresa C. Timlin, Administrative Law Judge, United States Department of Labor.

Joseph E. Wolfe and Brad A. Austin (Wolfe Williams & Reynolds), Norton, Virginia, for Claimant.

Paul Jones and Denise Hall Scarberry (Jones & Walters, PLLC), Pikeville, Kentucky, for Employer.

Before: BOGGS, Chief Administrative Appeals Judge, BUZZARD and JONES, Administrative Appeals Judges.

PER CURIAM:

Employer appeals Administrative Law Judge (ALJ) Theresa C. Timlin's Decision and Order Awarding Benefits (2019-BLA-05215) rendered on a claim filed on June 16, 2017, pursuant to the Black Lung Benefits Act, as amended, 30 U.S.C. §§901-944 (2018) (Act).

The ALJ credited Claimant with thirty-nine years of underground coal mine employment and found he has a totally disabling respiratory or pulmonary impairment. 20 C.F.R. §718.204(b)(2). She therefore determined Claimant invoked the presumption of total disability due to pneumoconiosis at Section 411(c)(4) of the Act, 30 U.S.C. §921(c)(4) (2018).[1] She further found Employer did not rebut the presumption and awarded benefits.

On appeal, Employer argues the ALJ erred in finding it did not rebut the Section 411(c)(4) presumption. Claimant responds in support of the award of benefits. The Director, Office of Workers' Compensation Programs, has not filed a response brief.[2]

The Benefits Review Board's scope of review is defined by statute. We must affirm the ALJ's Decision and Order if it is rational, supported by substantial evidence, and in accordance with applicable law.[3] 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Assocs., Inc.*, 380 U.S. 359, 362 (1965).

Rebuttal of the Section 411(c)(4) Presumption

Because Claimant invoked the Section 411(c)(4) presumption of total disability due to pneumoconiosis, the burden shifted to Employer to establish Claimant has neither legal

[1] Section 411(c)(4) provides a rebuttable presumption that a miner is totally disabled due to pneumoconiosis if he has at least fifteen years of underground or substantially similar surface coal mine employment and a totally disabling respiratory or pulmonary impairment. 30 U.S.C. §921(c)(4) (2018); *see* 20 C.F.R. §718.305.

[2] We affirm, as unchallenged on appeal, the ALJ's findings that Claimant established thirty-nine years of underground coal mine employment, total disability, and invocation of the Section 411(c)(4) presumption. *See Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983); Decision and Order at 8-9, 29.

[3] This case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, as Claimant performed his coal mine employment in West Virginia. *See Shupe v. Director, OWCP*, 12 BLR 1-200, 1-202 (1989) (en banc); Director's Exhibit 3; Hearing Transcript at 28.

nor clinical pneumoconiosis,[4] or that "no part of [his] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] §718.201." 20 C.F.R. §718.305(d)(1)(i), (ii). The ALJ found Employer rebutted the presumption that Claimant suffers from clinical pneumoconiosis, but did not rebut the presumption that he has legal pneumoconiosis or that no part of his total disability was caused by it. Decision and Order at 43-44.

Legal Pneumoconiosis

To disprove legal pneumoconiosis, Employer must establish Claimant does not have a chronic lung disease or impairment "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §§718.201(a)(2), (b), 718.305(d)(1)(i)(A); *see Minich v. Keystone Coal Mining Corp.*, 25 BLR 1-149, 1-155 n.8 (2015).

Employer submitted the opinions of Drs. Jarboe and Rosenberg.[5] Dr. Jarboe opined smoking and bronchial asthma caused Claimant's airflow obstruction and that it was unrelated to his coal mine dust exposure. Employer's Exhibits 2 at 6-8; 7, 8. Dr. Rosenberg opined Claimant has patterns of respiratory impairment consistent with legal

[4] "Legal pneumoconiosis" includes "any chronic lung disease or impairment and its sequelae arising out of coal mine employment." 20 C.F.R. §718.201(a)(2). The definition includes "any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment." 20 C.F.R. §718.201(b). "Clinical pneumoconiosis" consists of "those diseases recognized by the medical community as pneumoconioses, *i.e.*, the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment." 20 C.F.R. §718.201(a)(1).

[5] The ALJ also considered the opinions of Drs. Raj and Habre. Decision and Order at 34-35, 43; Claimant's Exhibits 2, 3; Employer's Exhibit 9; Director's Exhibit 16. She gave little weight to Dr. Raj's opinion because he testified he "always" diagnoses legal pneumoconiosis, and she accorded "normal weight" to Dr. Habre's opinion that Claimant has legal pneumoconiosis. Decision and Order at 34-35.

pneumoconiosis.[6] Employer's Exhibit 1 at 5. The ALJ found their opinions not well-reasoned and entitled to little weight.[7] Decision and Order at 33-35, 43.

Employer contends the ALJ applied the wrong legal standard by requiring Dr. Jarboe to "rule out" coal mine dust exposure as a causative factor for Claimant's impairment. Employer's Petition for Review and Brief (Employer's Brief) at 4-6. We disagree. The ALJ correctly observed Employer must prove Claimant's pulmonary impairment is not "significantly related to, or substantially aggravated by, dust exposure in coal mine employment." Decision and Order at 30. Moreover, she discredited Dr. Jarboe's opinion because she found it not well-reasoned, not because it failed to meet a heightened legal standard. Decision and Order at 34-35, 43.

She noted that although Dr. Jarboe attributed Claimant's pulmonary impairment to bronchial asthma and smoking "rather than" coal mine dust exposure, these are not necessarily "mutually exclusive" explanations. Decision and Order at 34-35. The ALJ permissibly discounted Dr. Jarboe's opinion because she found that he did not adequately explain why, even if Claimant has asthma, Claimant's pulmonary impairment is not significantly related to, or substantially aggravated by, his thirty-nine years of underground coal mine dust exposure. *See Mingo Logan Coal Co. v. Owens*, 724 F.3d 550, 558 (4th Cir. 2013); *Harman Mining Co. v. Director, OWCP* [*Looney*], 678 F.3d 305, 313-14 (4th Cir. 2012) (ALJ may accord less weight to a physician who fails to adequately explain why a miner's obstructive disease "was not due at least in part to his coal dust exposure"); Decision and Order at 34-35, 43.

We therefore reject Employer's argument that the ALJ did not adequately explain why she discredited Dr. Jarboe's opinion as the Administrative Procedure Act (APA) requires.[8] *See* 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a);

[6] Dr. Rosenberg explained that Claimant's "generally preserved FEV1/FVC ratio is consistent with impairments related to legal" pneumoconiosis and that "his pattern of ventilatory impairment supports legal [pneumoconiosis] contributing to his qualifying spirometric measurements." Employer's Exhibit 1 at 5.

[7] The administrative law judge found Dr. Rosenberg did not clearly answer the question of whether he believes Claimant has legal pneumoconiosis. Because Employer does not challenge the ALJ's discrediting of Dr. Rosenberg's opinion, we affirm it. *Skrack*, 6 BLR at 1-711; Decision and Order at 33-34, 43.

[8] The APA provides that every adjudicatory decision must include "findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or

Employer's Brief at 4-6. Because it is supported by substantial evidence, we affirm the ALJ's determination that Dr. Jarboe's opinion is insufficient to affirmatively establish Claimant does not have legal pneumoconiosis. S*ee Looney*, 678 F.3d at 316 (if a reviewing court can discern what the ALJ did and why she did it, the duty of explanation under the APA is satisfied); *Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 762 n.10 (4th Cir. 1999); Decision and Order at 34-35, 43.

Additionally, Employer argues that the ALJ erred in considering Dr. Raj's opinion on legal pneumoconiosis because Claimant untimely submitted Dr. Raj's medical reports as evidence. Employer's Brief at 6-7, *citing* Claimant's Exhibits 2, 3. Employer has not explained why the ALJ's alleged error requires remand, as the ALJ gave little weight to Dr. Raj's opinion on legal pneumoconiosis. Because Employer has the burden of proof in rebutting the presumption and the ALJ gave valid reasons for discrediting its experts, we consider any error by the ALJ in admitting Dr. Raj's reports to be harmless. *See Shinseki v. Sanders*, 556 U.S. 396, 413 (2009) (appellant must explain how the "error to which [it] points could have made any difference"); *Larioni v. Director, OWCP*, 6 BLR 1-1276, 1-1278 (1984); Decision and Order at 43; Hearing Transcript at 22.

Employer's arguments on legal pneumoconiosis are a request to reweigh the evidence, which we are not empowered to do. *Anderson v. Valley Camp of Utah, Inc.*, 12 BLR 1-111, 1-113 (1989). We therefore affirm the ALJ's finding that Employer did not rebut the Section 411(c)(4) presumption by establishing the absence of pneumoconiosis. *See* 20 C.F.R. §718.305(d)(1)(i).

Disability Causation

The ALJ next considered whether Employer established "no part of the [Claimant's] respiratory or pulmonary total disability was caused by pneumoconiosis as defined in [20 C.F.R.] § 718.201." 20 C.F.R. §718.305(d)(1)(ii); Decision and Order at 43-44. The ALJ permissibly discredited Dr. Jarboe's opinion on the cause of Claimant's pulmonary disability because he did not diagnose legal pneumoconiosis.[9] *See Hobet Mining, LLC v. Epling*, 783 F.3d 498, 504-05 (4th Cir. 2015), *quoting Toler v. E. Associated Coal Corp.*,

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discretion presented. . . ." 5 U.S.C. §557(c)(3)(A), as incorporated into the Act by 30 U.S.C. §932(a).

[9] Dr. Jarboe did not offer an explanation with respect to whether legal pneumoconiosis caused Claimant's total respiratory disability independent of his conclusion that the Miner did not have the disease. Further, Employer does not challenge the ALJ's rejection of Dr. Rosenberg's opinion as to whether pneumoconiosis caused Claimant's disability. *Skrack*, 6 BLR at 1-711.

43 F.3d 109, 116 (4th Cir. 1995) (such an opinion "may not be credited at all" on disability causation absent "specific and persuasive reasons" for concluding the physician's view on disability causation is independent of his or her erroneous opinion on pneumoconiosis); Decision and Order at 43-44. We therefore affirm the ALJ's finding that Employer failed to establish that no part of Claimant's pulmonary disability is caused by legal pneumoconiosis. 20 C.F.R. §718.305(d)(1)(ii).

Accordingly, we affirm the ALJ's Decision and Order Awarding Benefits.

SO ORDERED.

JUDITH S. BOGGS, Chief
Administrative Appeals Judge

GREG J. BUZZARD
Administrative Appeals Judge

MELISSA LIN JONES
Administrative Appeals Judge